

state regulation of IP-enabled services, which are, by nature, interstate. USA Datanet agrees, and urges the Commission to adopt an order preempting state regulation of IP-enabled services as soon as possible, even if the Commission must defer consideration of other issues until a later date. Otherwise, a patchwork of inconsistent state rulings and regulations could unnecessarily dampen the growth of the market for IP-enabled applications and services, which is contrary to the public interest.

I. THE FCC SHOULD EXPLICITLY PREEMPT STATE REGULATION OF IP-ENABLED SERVICES, WHICH ARE INHERENTLY INTERSTATE

As numerous parties explained in their comments, IP-enabled services are inherently interstate due to the manner in which they are provided.² Accordingly, IP-enabled services are subject to federal jurisdiction under the Act. However, unless the FCC asserts exclusive federal jurisdiction over IP-enabled services, growth in the market for broadband services and IP-enabled applications could be unnecessarily dampened by inconsistent state rulings and regulations regarding the proper classification and regulatory framework for IP-enabled services. Because this result would be directly contrary to the goals of the Act, USA Datanet agrees with the overwhelming majority of commenting parties that the FCC should explicitly preempt state

² See, e.g., AT&T at 42-43 (explaining that VoIP services are inherently interstate); Cablevision at 12 (noting inability to separate the intrastate and interstate components of VoIP services); CISCO at 3-6 (explaining that IP-enabled services and transmissions are interstate); Computer & Commun. Assoc. at 10 (explaining that voice packets are by nature interstate); Consumer Electronics Association (“Consumer Elec. Assoc. ”) at 3-4 (explaining that the inherent interstate nature of IP services makes it virtually impossible to separate interstate from intrastate components); CTIA at 2-7 (explaining that IP-enabled services are fundamentally interstate); Covad at 18-19 (explaining the inherently interstate character of IP enabled services and the underlying transmission facilities); Fed. for Econ. Rational Util. Policy (“FERUP”) at 8 (explaining that IP-enabled services are necessarily interstate in nature); Level 3 at 13-22 (explaining why IP-enabled services are jurisdictionally interstate; Net2Phone at 14-15 (explaining that geographic components of IP-enabled services generally cannot be determined); SBC at 29-31 (noting that no intrastate component can be separated out of an IP-enabled service); USTA at 34-35 (explaining that packet-based services cannot be separated into inter- and intrastate services); Voice on the Net Coalition (“VON”) at 21-22 (explaining that IP-enabled services are inherently interstate); Vonage at 14-23 (explaining why IP-services are inherently interstate).

regulation of IP-enabled applications and services.³ In order to prevent further harm to the market for IP-enabled applications and services, USA Datanet urges the Commission to adopt an order preempting state regulation of IP-enabled services as soon as possible, even if the agency must defer consideration of other issues until a later date.

II. THE COMMISSION SHOULD FURTHER THE GOALS OF THE ACT BY SEEKING NARROWLY TAILORED SOLUTIONS TO SPECIFIC PROBLEMS

USA Datanet explained in its initial comments that it would be inappropriate to subject IP-enabled services to the entire panoply of common carrier regulations designed for circuit-switched services merely because they also offer the capability for real-time voice communications. Rather, the Commission should examine the specific need at hand (*e.g.*, universal service, intercarrier compensation, 911 services, CALEA) and adopt targeted regulations designed to meet those needs, which very well may result in different criteria for applicability for the different regulations.

The comments reflect widespread agreement that the Act provides the Commission with the flexibility to adopt narrowly targeted regulations in order to achieve specific statutory goals.⁴ Specifically, the Commission has the authority under Section 10 of the Act to forbear from

³ *See, e.g.*, AT&T at 42-43 (urging the Commission to assert exclusive federal jurisdiction over IP-enabled applications and services); BellSouth at 11-14, 32-36 (same); Conference of Catholic Bishops (“Catholic Bishops”) at 21-22 (same); Cablevision at 11-12 (same); Consumer Elec. Assoc. at 3-4 (same); CISCO at 3-6 (same); CompTel/ASCENT at 3-5 (same); Computer & Comm. Assoc. at 10-11 (same); Covad at 18-19 (same); CTIA at 2-7 (same); DialPad et al (“DialPad”) 4-5 (same); Electronic Frontier at 6 (same); FERUP at 7 (same); Global Crossing at 7 (same); Information Technology Association of America (“ITA”) at 20, 22-23 (same); Level 3 at 13-22 (same); Motorola at 4-7; Net2Phone at 14-15 (same); National Cable & Telecommunications Association (“NCTA”) at 32 (same); Nuvio at 6-8 (same); Qwest at 28-36 (same); SBC at 43-47 (same); Time Warner at 26-27 (same); USTA at 34-35 (same); Verizon at 39-42 (same); Virgin Mobile at 4-6 (same); VON at 21-23 (same); Vonage at 14-23 (same).

⁴ *See, e.g.*, AT&T at 15-21 (explaining that where VoIP services do not fit squarely within the information services regulatory classification, and a telecommunications service classification would otherwise produce unnecessarily stringent regulatory outcomes, the Commission has broad authority to avoid that result, through forbearance, interpretation, waiver or rulemaking.); BellSouth at 56 (noting that the FCC has a “host of statutory tools” to target issues without imposing unnecessary regulation).

applying Title II regulation to telecommunications services,⁵ and the authority under Section 4(i) of the Act to impose Title II-type regulations on information services when necessary to achieve the goals of the Act.⁶ USA Datanet urges the Commission to exercise this flexibility to adopt narrowly targeted policies and regulations to meet specific needs. In this manner, the Commission can best encourage the development of market-driven solutions to the challenges that providers of IP-enabled services face while ensuring that all of the goals of the Act are met.

A. The Commission Should Promptly Resolve Pending Intercarrier Compensation Issues.

In its initial comments, USA Datanet urged the Commission promptly to address a number of key issues causing uncertainty with respect to IP-enabled applications and services, including issues relating to intercarrier compensation. The comments of other parties reflect

⁵ *See, e.g.*, AT&T at 15-21 (explaining that where VoIP services do not fit squarely within the information services regulatory classification, and a telecommunications service classification would otherwise produce unnecessarily stringent regulatory outcomes, the Commission has broad authority to avoid that result, through forbearance, interpretation, waiver or rulemaking.); BellSouth at 59-62 (urging FCC to use its authority, including forbearance authority to eliminate Title II regulation for IP-enabled services that are Telecommunications services); CISCO at 17-18 (explaining that, if any IP services are considered telecommunications that are subject to Title II, the Commission can and should invoke forbearance authority to decline to apply full regulations over IP services); Comcast at 15-16 (noting that the Commission can use its forbearance authority with respect to VoIP services that are classified as “telecommunications services” under Title II); Cox at 22 (explaining that, “to the extent that the Commission concludes that IP telephony is a telecommunications service, the Commission can employ its forbearance authority to eliminate any unnecessary regulation on IP-based services”); NASUCA 26-28 (noting that FCC has the authority to forbear from Title II regulation); NCTA at 29-32 (same); SBC at 33-37 (same); CPUC at 41 (same); Time Warner at 36 (same); USTA at 22-25 (same); DOJ at 6 (same); Verizon at 24, 29-31 (same).

⁶ *See, e.g.*, BellSouth at 29-32 (explaining that FCC has authority under Title I to “ensure rational, pro-competitive” treatment of IP-based services); Comcast at 11, 14-15 (urging Commission to excise its authority under Title I); Cox at 23 (noting that if the Commission decides that certain IP-enabled services are information services, it has ancillary jurisdiction to promulgate regulations of such services); ITA at 17 (supporting use of FCC ancillary authority under Title I to adopt rules governing VoIP); MCI at 24-35 (discussing FCC’s authority to exercise Title I ancillary jurisdiction); NCTA at 24-25 (supporting use of FCC ancillary authority under Title I to adopt rules governing VoIP); Net2Phone at 12 (urging FCC to apply Title I regulation to address specific issues but do not impose other regulation); Qwest at v-vi, 36-40 (acknowledging ancillary jurisdiction over IP-based services); SBC at 52-57 (noting the FCC’s ancillary jurisdiction); Catholic Bishops at 13-16, 21-22, 29-33 (discussing FCC’s ancillary authority); USTA at 28-29 (urging use of Title I authority to maintain deregulation of information services); VON at 19-21, 28-29 (supporting Title I ancillary jurisdiction).

widespread agreement that the intercarrier compensation regime must be reformed as soon as possible.⁷ The current disparities between above-cost access rates and reciprocal compensation rates leads to unnecessary disputes between providers of all types of services, which serves only to dampen the growth of the markets for broadband services and IP-enabled applications. The root cause of many of these disputes would disappear once the Commission equalizes intercarrier compensation rates to the point that a minute-is-a-minute. USA Datanet supports a bill-and-keep regime, and urges the Commission to implement such a regime as soon as possible.⁸ Until the Commission can implement a bill-and-keep regime or, at a minimum, eliminate above-cost

⁷ See, e.g., AT&T at 6, 21-28 (urging Commission to move away, as soon as possible, from the system of wildly varying carrier-to-carrier payments for functionally identical transport and termination and towards a uniform rule of bill-and-keep or other cost-based compensation); CISCO at 8 (noting that the intercarrier compensation regime “is an example of outmoded economic regulation that should not be applied to VoIP services”); Computer & Comm. Assoc. at 19 (explaining that distinctions between local and long distance calls vis-à-vis VoIP make no sense from either a technology viewpoint or an access charge advantage point); Computing Tech. Industry Assoc. (“CompTIA”) at 12 (explaining that the current intercarrier compensation scheme is antiquated and essentially broken, and that the continuation of subsidy policies from the legacy era is entirely counterproductive); Covad at 26-27 (urging the FCC to refrain from imposing legacy access charge regulations on VoIP services); DialPad at 22 (noting that the current access charge system requires reform to reflect the new realities of the telecommunications market); FERUP at 18-19 (explaining that the current intercarrier compensation scheme is broken); ITA at 24-28 (supporting waiver of carrier access charge regime); MCI at 44-47 (supporting replacement of current intercarrier access regime with “cost-causative, technologically neutral, and jurisdictionally-agnostic manner”); Net2Phone at 26 (supporting waiver of carrier access charge regime until pending reform is resolved); NJ BPU at 9 (explaining that FCC must incorporate a forward looking view rather than dwelling on past outdated categorizations of telephony services and providers); Nuvio at 11 (supporting waiver of intercarrier compensation regime); Texas Atty Gen’l. at 7-8 (IP-enabled service providers should pay intercarrier compensation but not the current per minute access charges that apply to interstate service); Pulver.Com at 19-20 (explaining that VoIP services that do not touch the PSTN should not be subject to intercarrier compensation, and VoIP services that touch the PSTN should not be subject to current dysfunctional intercarrier compensation regime); VON at 26-28 (current intercarrier compensation regime is inefficient, chills innovation and should not apply to VoIP); Vonage at 45-47 (urging FCC to reform existing regime before considering whether to apply it to VoIP services).

⁸ See, e.g., AT&T at 6, 21-28 (urging the Commission to adopt a uniform rule of bill-and-keep or other cost-based compensation); CTIA at 9-10 (supporting a bill-and-keep structure for traffic that traverses the circuit switched network); MCI at 47 (supporting bill-and-keep regime); and PointOne at 33-35 (same).

access charges, the Commission should ensure that providers of IP-enabled services are not subject to the current above-cost access charges.⁹

B. The Commission Should Ensure that the Universal Service Funding Mechanism is Competitively Neutral.

Many of the comments reflect the widespread recognition in the industry that the universal service funding mechanism should be reformed, which could help alleviate the controversy regarding the proper classification of certain IP-based services.¹⁰ In reforming the universal service mechanism, however, the Commission should focus on ensuring that the obligation to contribute is competitively neutral across all types of services provided that no single end user service should be subject to multiple funding obligations (*e.g.*, separate funding obligations for both the facilities and applications layers).

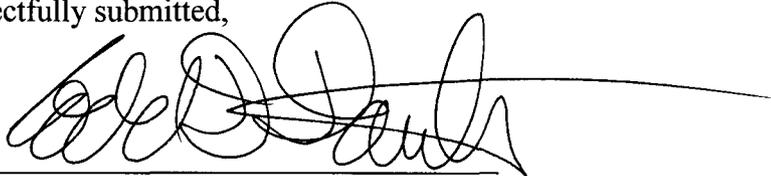
⁹ *See, e.g.*, CISCO at 8 (arguing that current access charges should not be applied to VoIP services); Covad at 26-27 (urging FCC to refrain from imposing legacy access charge regulations on VoIP services); ITA at 24-28 (supporting waiver of carrier access charge regime); Net2Phone at 26 (supporting waiver of carrier access charge regime until pending reform is resolved); Nuvio at 11 (supporting waiver of intercarrier compensation regime); Texas Atty Gen'l. at 7-8 (arguing that IP-enabled service providers should not pay the current per minute access charges that apply to interstate service); VON at 26-28 (explaining that current intercarrier compensation regime is inefficient, chills innovation and should not apply to VoIP); Vonage at 45-47 (urging the FCC to reform existing regime before considering whether to apply it to VoIP services).

¹⁰ *See, e.g.*, Global Crossing at 12-13 (recommending USF be competitively neutral); ITA at 24-28 (supporting waiver of USF payment requirement until funding mechanism is reformed).

III. CONCLUSION

USA Datanet urges the Commission to resolve the issues raised in this proceeding as quickly as possible in accordance with the foregoing recommendations.

Respectfully submitted,

By: 

Brad Mutschelknaus

Todd D. Daubert

KELLEY DRYE & WARREN LLP

1200 19th Street, N.W., Suite 500

Washington, D.C. 20036

(202) 955-9600

Counsel to USA Datanet Corporation

Dated: July 14, 2004